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CORRESPONDENCE.

Editor, "Virginia Law Register:"

A question concerning the constitutionality of an "Act to provide for the issuing of county bonds for the permanent road or bridge improvement in the Magisterial Districts of the Counties of the State," approved February 25th, 1908, Session Acts 1908, page 71, has recently arisen in this section which is of such general importance to the State at large that I think it deserves consideration in your columns. Section 2 of the Act contains this clause:

"The Judges of Election at the several voting precincts shall, immediately after the closing of the polls at each of the said places, count the ballots deposited and shall, within two days after said election, make returns thereof as provided in other elections, *provided that no voter shall be allowed to vote in said election who resides and is a voter in a town exempt from road tax.*"

Section 7, of the Act provides as follows: "After issuing such bonds, or any of them, when next levy is made, or tax imposed, in said County, a tax shall be levied on all of the property liable to State tax in said *Magisterial District* in which the proceeds of the bonds have been, or are to be expended, to pay the interest on the bonds so issued, and to create a sinking fund to redeem the principal thereof at maturity, etc."

The question is, has the Legislature the constitutional right to delegate to a *part* of the voters of a District the question of borrowing money and issuing bonds to secure the same, and, at the same time, provide that, if the election is in favor of the bond issue, the property in the *whole* District shall be taxed to pay the same?

For instance, the Town of Jonesville, in Lee County, Virginia, is a separate Road District, and is exempt from taxation for road purposes in the County at large. An election will be held in Lee County tomorrow on the question of a bond issue in the Jonesville Magisterial District, as well as in the other Districts in the County. Under § 2 of the Act, the people in Jonesville have no right to vote upon the question. Yet, under § 7 of the Act, if the election is favorable to the bond issue, a tax to pay the bonds and interest thereon must be "levied on all property liable to State tax in such Magisterial District."

Is not this taxation without representation?

Section 6 of the Bill of Rights provides as follows:

"Section 6. Elections to Be Free.—That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or *damaged* in their property for public uses, without their own consent, or that of their

representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."

The Act in question seems to be in conflict with this provision of the constitution. The people in Jonesville, for instance, if the election carries, will be taxed "without their consent, or that of their representatives, duly elected."

It is a general principle that the Legislature cannot delegate the taxing power. See Cooley on Taxation, 3rd Ed., pages 99 to 105. To this general principle, however, there are certain well-recognized exceptions. For instance, it is universally held that the Legislature can delegate the taxing power to municipal corporations for town and city purposes, and to the Board of Supervisors for County purposes. It is also settled that the Legislature has full supervision of the Counties of the State, and that it can authorize a bond issue without leaving the question to the local authorities.

It will be observed, however, that in the present case the Legislature has not itself passed on the question—it has not decided, for instance, that Lee County shall, or shall not, borrow money for road purposes and issue bonds to pay therefor. So, likewise, it has not left this question to the Board of Supervisors of Lee County. It has delegated its power to the voters of Lee County, but in so doing has expressly provided that a *part* of the voters of the County shall not vote upon the question.

Coming back now to § 6 of the Bill of Rights, it will be seen that the tax in question, if levied, will be without the consent of the *representatives* of the people of Lee, and the Act will, therefore, be unconstitutional, unless it can be shown that the said tax is with "their own consent." Can the tax be said to be with the consent of the people when only a part of them are allowed to vote on this question? If so, it would seem that the Legislature had the right to provide that any county should be taxed for road purposes, court house purposes, or any other purpose, provided the majority of those voting at an election favored the tax, and at the same time to provide that only one Magisterial District in the County might vote on the subject, or that only the people in one small town, or cross-roads, in the County might vote thereon. Such an act would be so unjust, that if there is not, there certainly ought to be, some provision in the constitution which would prohibit it.

I believe that § 6 of the Bill of Rights above quoted does prohibit it.

Nevertheless, there is one decision in Virginia, which may be considered as upholding the constitutionality of such an act. I refer to Langhorne and Scott v. Robinson, 20 Gratt. 661. It appears from this case that the Legislature had passed an act authorizing the Common Council of Lynchburg to guarantee the payment of interest on certain bonds of the Lynchburg and Tennessee Railroad Company, and

further provided that to meet the guaranty the council should have power to assess taxes upon all lands and property within the City, and, also, upon all property "for half mile round" the city. The court upheld the constitutionality of the Act, and expressly held that it did not violate § 6 of the Bill of Rights. The Court said: "The tax being thus imposed by the power and authority of the Legislature alone, it follows that it might as well be delegated to local authorities who do not represent the people, as having been elected by them." The Court further held that the Town Council of Lynchburg, in acting under this act, did not act as a Town Council, but acted as Special Agents selected by the Legislature. If this decision be correct, it would seem to follow that the Legislature could leave the question of whether a county should or should not issue bonds and levy taxes to pay the same to any private individual of the State, no matter who he might be; yet this would be so clearly contrary to almost all the authorities that it would seem that this decision must be erroneous. I believe that the falacy of the decision lies in the statement of the Court above quoted: "The tax being thus imposed by the power and authority of the Legislature alone." As a matter of fact, the tax was not imposed by the Legislature—the Legislature did not determine the question—it simply left the question to the said special agents to be by them determined.

As I understand, several of the Counties in the State have already voted on the question of issuing bonds to improve roads under the Act of 1908, and a number of others are preparing to do so. The question is, therefore, one of vital interest, and I hope you will give your own opinion thereon, and, also, invite the opinion of other members of the bar.

J. F. BULLITT.

We have read with much interest the above communication, and would be glad to have the opinions of any members of the bar as to the constitutionality of this act. Two points, however, one on each side of this question, occur to us which may aid somewhat in the solution of the difficulty: One is that § 7 provides that after issuing the bonds, etc., a tax shall be levied on all of the property *liable* to state tax, etc., but these persons making the complaint are expressly exempted by § 2 from the payment of any road tax. If they are exempted from a road tax, could a tax be levied or imposed on them to pay the interest on bonds issued for road improvement? The other is that the case of *Langhorne v. Robinson*, 20 Gratt. 661, which is cited to sustain the constitutionality of the act, was expressly overruled by the Supreme Court of Appeals in *Robinson v. City of Norfolk*, 14 Va. Law Reg. 292.